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In the Supreme Court of the United States

OCTOBER TERM, 1980

ASSURE COMPETITIVE TRANSPORTATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, which by statute retains all its powers despite vacancies in its membership, is lawfully constituted when the President has not filled five vacancies.

2. Whether a quorum of the Commission is a majority of the Commissioners in office.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 629 F.2d 467. Two of the opinions of the Interstate Commerce Commission (Pet. App. C1-C15 and D1-D8) are reported at 130 M.C.C. 243 and 131 M.C.C. 573; two subsequent opinions of the Commission (Pet. App. E1-E2 and F1-F4) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980. The petition for a writ of certiorari was filed on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two separate challenges to the jurisdiction of the Interstate Commerce Commission. These challenges arose in a motor carrier licensing proceeding before the Commission and in a lawsuit commenced by petitioner in the United States District Court for the Northern District of Illinois.

1. The Liberty Trucking Company Case

In 1979, the Commission, by a four to one vote, affirmed a grant of additional authority to the Liberty Trucking Company, a motor common carrier (Pet. App. D1-D8). Petitioner, which had opposed the grant, requested the Commission to vacate its decision for lack of jurisdiction. Petitioner argued that, under 49 U.S.C. 10301(b), "the Commission is composed of 11 members" (Pet. App. E1), and that 49 U.S.C. 10306(a) defines a quorum as a ma-

jority of the Commission. Because only five members participated in the *Liberty* decision, petitioner claimed that the decision was void for lack of a quorum.

The Commission denied petitioner's request (Pet. App. E1-E2) in light of 49 U.S.C. 10301(e), which provides that a "vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission." Noting that "[t]his provision * * * could not be clearer" (Pet. App. E1), the Commission concluded that a quorum consists of a majority of incumbent Commissioners (*id.* at E2).[1] Subsequently, petitioner sought judicial review of the Commission's decisions in the United States Court of Appeals for the Seventh Circuit.

2. The District Court Litigation

Prior to the Commission's decision in the *Liberty* application proceeding, petitioner filed a complaint in the United States District Court for the Northern District of Illinois (Pet. App. G1-G7), seeking a declaration that the Commission was illegally constituted and an order enjoining the Commission from acting "until such time as there is a quorum appointed" (*id.* at G6). Petitioner also requested the court to declare unlawful, for want of a quorum, all Commission actions taken since June 30, 1978 (*ibid.*).

The district court granted the Commission's motion to dismiss the complaint for lack of jurisdiction because exclusive review is vested in the courts of

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[1] Petitioner also moved the Commission to stay its decision "insofar as the Commission purports to take action with less than a full complement of eleven Commissioners" (Pet. App. F1). The Commission denied petitioner's motion for a stay (*id.* at F4).

appeals (Pet. App. B1-B3). The court additionally noted "[b]y way of dictum" that the Commission, with six members, was lawfully constituted to transact business notwithstanding the existence of vacancies in its membership (*id.* at B2). Petitioner appealed the district court's dismissal, and the court of appeals consolidated the appeal with petitioner's request for review of the Commission's decision in the *Liberty* case (*id.* at A5).

3. The Court of Appeals Proceeding

In the court of appeals, petitioner argued that a minimum of six Commissioners is necessary for a quorum and that the Commission was constitutionally barred from acting because Presidents Ford and Carter had illegally failed to fill existing vacancies, thereby permitting the Commission's membership to fall below eleven (Pet. App. A2-A3).

The court of appeals affirmed the decisions of the Commission and the district court (Pet. App. A1-A27). Specifically rejecting petitioner's contention concerning the absence of a quorum, the court agreed with the Commission's conclusion that the vacancy provision in 49 U.S.C. 10301(e) authorizes a majority of the Commissioners in office to exercise the full power of the Commission (Pet. App. A10-A15). With respect to petitioner's constitutional challenge to the Commission's jurisdiction, the court found that the only alleged illegality was on the part of the President, who was not a party to the lawsuit (*id.* at A16). Expressing no opinion as to whether the President's failure to appoint Commissioners was itself unlawful or actionable (*id.* at A18), the court "concluded that the Commission's actions are not invalid on the basis of too few Commissioners and will not be invalid so long as the existing Commissioners have been validly appointed * * *" (*id.* at A17).

ARGUMENT

This case presents no conflict among the circuits or any legal issue of general importance. Two circuits have now rejected the claim that the Commission is powerless to act with fewer than six participating Commissioners.[2] Those decisions are correct, and further review is unwarranted.

1. Petitioner's principal contention (Pet. 9-14) is that the court of appeals erred by not deciding whether the President acted unlawfully in failing to appoint members to fill Commission vacancies.

Petitioner's argument is without merit. The court of appeals properly did not decide this question because its resolution was unnecessary for disposition of the issues petitioner had raised. Petitioner challenged the Commission's jurisdiction to act, asserting that the Commission lacked the eleven members specified by statute and that in a given instance it had proceeded without a quorum. The court of appeals rejected petitioner's jurisdictional challenge by holding that the Commission could function with fewer than eleven members and that a quorum was a majority of the Commissioners in office (Pet. App. A12). Because the President's failure to appoint additional

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[2] In a decision not cited by petitioner, the United States Court of Appeals for the Eighth Circuit has also rejected the argument that a majority of eleven Commissioners must participate if a Commission action is to be valid. In *Missouri Pacific R.R.* v. *United States*, 625 F.2d 178 (1980), a railroad challenged the Commission's denial, by a three to two vote, of an abandonment application. The railroad argued that the denial was invalid because the five Commissioners who voted did not constitute a quorum. The court of appeals summarily rejected the railroad's argument, stating that "[w]e have also reviewed the procedural errors alleged by MoPac, and find them to be without merit" (*id.* at 183).

Commissioners, even if unlawful, would not have deprived the Commission of jurisdiction to act in particular cases, the court of appeals correctly found it unnecessary to decide whether the President had acted illegally (*id.* at A17-A18).

2. Petitioner further contends (Pet. 14-19) that the court of appeals misconstrued the Commission's statutory quorum provision on the grounds that the court did not apply the common law, that some courts have different quorum requirements, and that statutes specifying quorums for other agencies specifically define a quorum to be a majority of the agency members in office. This contention is unfounded.

Because the Commission was created by statutory enactment, its composition and authority are matters controlled by statute and not by the common law. Thus, to determine whether the Commission could lawfully act with fewer than eleven members, the court of appeals properly turned to the two statutory provisions specifically governing vacancies and quorums.

Petitioner does not, and reasonably could not, dispute the court's essential conclusion that the vacancy provision in 49 U.S.C. 10301(e) shows that "Congress intended those Commissioners in office, however many there are, to be 'the Commission' for all purposes" (Pet. App. A12). Because the vacancy provision directs that "the Commission" is composed of the members in office, the court of appeals correctly concluded that a quorum, which is a majority of "the Interstate Commerce Commission," is a majority of the Commissioners in office. The court's conclusion is logical, comports with the legislative history (see Pet. App. A14-A15), and gives full effect to each of the relevant statutory provisions.

In contrast, petitioner's claim that fewer than six Commissioners cannot transact the Commission's business would read out of the statute the vacancy provision, which expressly provides that a "vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission" (49 U.S.C. 10301(e)). Petitioner cites no legislative history to support its interpretation of the statute, and its position is contrary to the "fundamental rule of statutory construction that legislative enactments be construed in a manner designed to give effect to all parts while avoiding a result contrary to the apparent intent of the Congress." *Certified Color Manufacturers Ass'n* v. *Mathews*, 543 F.2d 284, 296 (D.C. Cir. 1976). See also, *e.g.*, *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

The cases petitioner relies on (Pet. 16-18) do not support its assertion that a quorum is invariably a majority of the full complement of agency members. All of those cases involved factual circumstances very different from those presented here.[3] Nor is the court of appeals' decision undermined by statutes governing other agencies that specifically make a quorum a majority of those in office (Pet. 18). On

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[3] *Frischer & Co.* v. *Bakelite Corp.*, 39 F.2d 247 (C.C. P.A.), cert. denied, 282 U.S. 852 (1930), involved a challenge to an action by three members of a six-member commission. Because there were no vacancies on that commission, the court did not address or resolve the issue of how many members are necessary for a quorum when vacancies exist. 39 F.2d at 251, 254-256. *Johnson* v. *State ex rel. Brannon*, 1 Ga. 271 (1846), and *Paine* v. *Foster*, 9 Okla. 213, 53 P. 109 (1896), state the common law rule for quorums of courts and did not concern statutory requirements for administrative agencies.

the contrary, the court of appeals correctly found (Pet. App. A14) that the existence of such statutes refutes petitioner's argument that a quorum of less than half of the full number of Commissioners is an " 'absurdity' Congress would never permit."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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